

# **Exhibit B**

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 \* \* \* \* \*

4 SHEILA J. PORTER

Plaintiff

5

VERSUS

CA-04-11935-DPW

6

ANDREA CABRAL

7

Defendant

8

\* \* \* \* \*

9

10 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK

11 UNITED STATES DISTRICT COURT JUDGE

12 JURY TRIAL - DAY SEVEN

13 JANUARY 18, 2006

14

15 APPEARANCES:

16 JOSEPH F. SAVAGE, JR., ESQ, Goodwin, Procter, LLP,  
17 53 State Street, Boston, Massachusetts 02109, on  
18 behalf of the Plaintiff

19

20 DAVID S. SCHUMACHER, ESQ, Gadsby Hannah, LLP,  
21 225 Franklin Street, Boston, Massachusetts 02110,  
22 On behalf of the Plaintiff

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24 (Appearances continued next page)

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2 APPEARANCES (Continued):

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4 ELLEN CAULO, ESQ. AND JAMES M. DAVIN, ESQ.,  
5 Suffolk County Sheriff's Department, 200 Nashua  
6 Street, Boston, Massachusetts 02114, on behalf  
7 Of the Defendant

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Courtroom No. 1 - 3rd Floor

1 Courthouse Way

20

Boston, Massachusetts 02210

9:00 A.M. - 11:30 P.M.

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Pamela R. Owens - Official Court Reporter

23

John Joseph Moakley District Courthouse

1 Courthouse Way - Suite 3200

24

Boston, Massachusetts 02210

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<p style="text-align: right;">Page 3</p> <p>1 THE COURT: Well, I have had passed up to me the</p> <p>2 proposed jury instruction of the plaintiff regarding punitive</p> <p>3 damages.</p> <p>4 I will instruct on punitive damages to some degree</p> <p>5 in the fashion that is outlined in the proposal. The larger</p> <p>6 question of sustainability of punitive damages, if it comes to</p> <p>7 that, is something I will take up at a later point. I spent</p> <p>8 some time, perhaps obsessive, on a minor issue, but it becomes</p> <p>9 a major issue for purposes of instructions on the question of</p> <p>10 compensatory damages. And as a consequence, I have three</p> <p>11 alternative verdict slips that I want to discuss with you to</p> <p>12 get this straightened away. I also made -- and I don't know if</p> <p>13 the parties have some proposed changes to the verdict slip or</p> <p>14 not. I did make one typographical change to question 4a, if</p> <p>15 you have it, which, as it is written, referred to the unlawful</p> <p>16 act as "bearing" Sheila Porter from the Suffolk County House of</p> <p>17 Corrections. That seems to me to implicate a different set of</p> <p>18 legal principles. So I made it "barring" for that.</p> <p>19 So let me pass back what are alternatively called</p> <p>20 Porter one draft, Porter two draft and Porter three draft to</p> <p>21 tell you what my concerns are. We talked about them a bit</p> <p>22 yesterday, but I will explain it.</p> <p>23 My concerns are this: With respect to the question</p> <p>24 of economic damages and the question of pre-judgment interest,</p> <p>25 we get ourselves into the problem of present value. If this is</p>	<p style="text-align: right;">Page 5</p> <p>1 of the economic damages up to today. On the other hand, I</p> <p>2 would call this the Emily LaTella approach, nevermind, it</p> <p>3 doesn't make a lot of sense in terms of the amount of money</p> <p>4 involved here. So I raise it simply because I've spent some</p> <p>5 time thinking about how do I instruct properly on this without</p> <p>6 surprising the parties at the end by saying with the proposal</p> <p>7 of yesterday, number one, I'm not in a position to identify</p> <p>8 what the economic damages subject to pre-judgment interest</p> <p>9 would be if we ever get to that. So, I raise it. I don't know</p> <p>10 what your inclinations are with respect to that. But I think I</p> <p>11 need to know from you what you want. So, Mr. Savage?</p> <p>12 MR. SAVAGE: Just for entertainment's sake, prior</p> <p>13 to what I was obsessing on, too, I think it's even more</p> <p>14 complicated than draft two because I don't think pre-judgment</p> <p>15 interest could actually run on damages prior to the filing of</p> <p>16 the suit. So I think there's a separate chunk. I think it is</p> <p>17 as you've said, more complicated than it's worth with the</p> <p>18 dollar figures at stake on that piece and we're content with</p> <p>19 the single draft.</p> <p>20 THE COURT: The single one which is --</p> <p>21 MR. SAVAGE: Draft number three.</p> <p>22 THE COURT: -- draft three. And I simply won't be</p> <p>23 discussing with the jury present value and that kind of</p> <p>24 thing.</p> <p>25 MR. SAVAGE: Right.</p>
<p style="text-align: right;">Page 4</p> <p>1 treated as a back pay, front pay, as it effectively is, then</p> <p>2 we're dealing, I think, with what has been set forth in</p> <p>3 question 3a in Porter two draft. That is, we have to identify</p> <p>4 the economic damages up to today separately from the economic</p> <p>5 damages in the future. Up to today is subject to pre-judgment</p> <p>6 interest. In the future is subject to discounting for present</p> <p>7 value and I have to instruct the jury as to discounting for</p> <p>8 present value. That is to say, an award today is more valuable</p> <p>9 because you get the money now as opposed to getting it in the</p> <p>10 future with the discounting that is involved in that. So, when</p> <p>11 Judges are forced to instruct on this kind of issue, it becomes</p> <p>12 rather complex, including a lengthy discussion of interest</p> <p>13 rates and the jury's evaluation of interest rates. Now, I'm</p> <p>14 not sure it is worth the candle. But if I am going to do it, I</p> <p>15 have to do it, I think, under proposal number two, draft number</p> <p>16 two. If we go to draft number three, which is the one that we</p> <p>17 came to rest on yesterday -- I'm sorry, draft number one, which</p> <p>18 is the one we came to rest on yesterday, I could not, I think,</p> <p>19 properly impose pre-judgment interest because I don't know how</p> <p>20 much the economic damages are before the judgment today and how</p> <p>21 much is after the judgment today. So, I just can't do it.</p> <p>22 This one doesn't affect it.</p> <p>23 If, however, we go to proposal number three, just</p> <p>24 ask damages without breaking them out. Now, that would make it</p> <p>25 impossible to impose pre-judgment interest on the particulars</p>	<p style="text-align: right;">Page 6</p> <p>1 THE COURT: Is that agreeable with the defendant?</p> <p>2 MR. DAVIN: Yes, Your Honor.</p> <p>3 THE COURT: Okay. So, I will ask my secretary to</p> <p>4 make up four copies of number three for the jury and so on.</p> <p>5 But are there any other typos or anything else that the parties</p> <p>6 have seen? Because what I'm obviously going to do is instruct</p> <p>7 the jury with them having this in their hands. And the parties</p> <p>8 are free, of course, to reference it in their closing</p> <p>9 arguments, although the jury will not have it in their hands at</p> <p>10 that point. Hearing none -- Michelle?</p> <p>11 OFF THE RECORD</p> <p>12 THE COURT: Okay. Anything else that we need to</p> <p>13 talk about before closing? All right. I think we are one</p> <p>14 short. Ms. Rynne is going to check again and see.</p> <p>15 (Jury in at 9:00 A.M.)</p> <p>16 THE COURT: Good morning. I'm asking Ms. Rynne to</p> <p>17 move the panel there. When the panels are put there, while I'm</p> <p>18 talking to you, I feel something like the Wizard of Oz speaking</p> <p>19 to you from behind a screen. I want to be able to see all of</p> <p>20 you to start the process of instructing, although I started the</p> <p>21 process of instructing you on the first day we met. And I'm</p> <p>22 going to give you instructions, final instructions after you</p> <p>23 have heard from the lawyers in their closing arguments. And</p> <p>24 you will keep in mind all of the instructions I have given</p> <p>25 during the course of the trial.</p>

<p style="text-align: right;">Page 7</p> <p>1 But specifically with respect to closing arguments, 2 you heard me at various times make rulings about various ways 3 that questions were asked and issues were presented to you 4 saying "that's argumentative, this isn't the time to be raising 5 that question in this fashion." And that was true then. It's 6 not true now. Now is the time for argument. And argument is 7 the effort to persuade you, using all of the evidence that has 8 come in to get you to see things the way the various parties 9 see things. I don't mean to deprecate or denigrate argument 10 in any way. It's a very important -- actually fundamentally 11 important to this process because this is the time the lawyers 12 have to focus your attention on what's really in dispute and to 13 marshal all of the evidence that they think supports their 14 proposition. One thing that you have to keep in mind is that 15 just as I used that jigsaw puzzle, for example, at the outset, 16 it's applicable now. During the course of the closing 17 arguments, the lawyers will make reference to what they recall 18 the evidence to be. But if you say "I didn't hear anything 19 like that," of course you're going to disregard that summary of 20 the evidence. The evidence is what you find in this case. 21 Nevertheless, this is the opportunity for the lawyers to be 22 able to present their side and their perspective on the case. 23 And it's very helpful, I think -- it will be very helpful, 24 particularly given the quality of the lawyers here -- to get 25 you right to the things that you need to decide to help us</p>	<p style="text-align: right;">Page 9</p> <p>1 and contract worker working at the House of Correction in 2 caring for the inmates incarcerated there. And I suggest to 3 you that, indeed, the credible evidence in this case proves 4 just that, that Sheriff Cabral barred Ms. Porter because she 5 did not document her significant observations and findings 6 regarding Mr. Rosario's medical condition in his medical record 7 and she did not file a report when she was directed to do so by 8 a Deputy Superintendent of this department and it was not 9 received until nine days later. Sheriff Cabral made this 10 decision. No one else. She has taken full responsibility and 11 and ownership of this decision. And she has taken this witness 12 stand in this courtroom and she has told you what she knew 13 about Ms. Porter's conduct, what she thought about Ms. Porter's 14 conduct, and why, when she was made aware of that conduct, she 15 decided that barring Ms. Porter was the appropriate thing to 16 do. It was the necessary thing to do. You will be asked in 17 this case to decide whether or not Ms. Porter's relaying 18 Mr. Rosario's allegations of abuse to the FBI was a substantial 19 or motivating factor in Sheriff Cabral's decision to bar her 20 from the House of Correction. I suggest to you that the answer 21 to that question, based upon the clear and unwaivering 22 testimony of Sheriff Cabral as well as who she is, her career 23 as a prosecutor, what she was obligated to do as Sheriff and 24 what she wanted to do as Sheriff leads to the unescapable and 25 unequivocal answer of no. This is what Sheriff Cabral did. In</p>
<p style="text-align: right;">Page 8</p> <p>1 resolve this case. 2 Now, under the Massachusetts system, the defendant 3 goes first in closing argument. So we'll hear first from 4 Ms. Caulo and then we'll hear from Mr. Savage. Ms. Caulo? 5 MS. CAULO: Thank you, Your Honor. Your Honor, I 6 may have occasion to use the screens. 7 THE COURT: I'm not the center of attention right 8 now, so you can move it back. I just wanted to be able to see 9 all the jurors. 10 MS. CAULO: I may activate the monitor. I don't 11 plan on using these. 12 CLOSING ARGUMENT ON BEHALF OF DEFENDANT 13 BY MS. CAULO: 14 Good morning. 15 Last week, I told you that the evidence produced 16 during the course of this trial would establish that Sheriff 17 Cabral did not revoke Ms. Porter's security clearance and bar 18 her from the House of Correction because she provided 19 information to the FBI. 20 Indeed, I told you that the evidence produced 21 during the course of this trial would establish that Sheriff 22 Cabral revoked Ms. Porter's security clearance and barred her 23 from the House of Correction because she failed to meet some 24 very basic and fundamental obligations as a Nurse Practitioner</p>	<p style="text-align: right;">Page 10</p> <p>1 June of 2004, she knew after being briefed by her Chief of the 2 Investigation Division, Viktor Theiss, that Mrs. Porter had 3 made significant observations of Rene Rosario's medical 4 condition and did not document them in his medical chart. She 5 knew in June 2004 that Mrs. Porter was directed by a Deputy 6 Superintendent to provide a written report of her encounter 7 with Mr. Rosario and she failed to do so until nine days 8 later. Sheriff Cabral knew in June of 2004 that the failure to 9 document and the failure to report occurred in the context of 10 an inmate making allegations of abuse by an officer. And yes, 11 she knew that Mrs. Porter had provided information to the FBI 12 regarding Mr. Rosario's allegations. And this is what she 13 thought about that conduct. Sheriff Cabral was appalled and in 14 disbelief that a medical staff person possessing this specific 15 and fundamental information, direct evidence from an inmate of 16 abuse, would not document the medical records. And Sheriff 17 Cabral did not come to this belief in the importance of 18 documentation overnight. You know that. You know that for 16 19 years, she was a prosecutor prosecuting cases involving civil 20 rights violations, prosecuting cases involving domestic abuse. 21 She knew first hand the importance of timely and 22 contemporaneous documentation. And she's not the only one who 23 thought that. Every single witness who took that stand in this 24 courtroom and was asked a question about whether or not 25 documentation was important responded affirmatively. Christa</p>

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1 Snyder, the FBI agent with whom Mrs. Porter was working, told  
2 you that documentation had evidentiary significance, that one  
3 of the first things they do is to subpoena the medical  
4 records.

5 Mary Ellen Mastrorilli, the Deputy Superintendent  
6 who directed Ms. Porter to provide the report stressed the  
7 importance of timely and accurate reporting, particularly in  
8 the context of investigations. If it's not written down, it  
9 didn't happen.

10 Elizabeth Keeley, the Chief-of-Staff, a veteran  
11 prosecutor, spoke to you about her own experience involving  
12 cases that were won or lost on the absence of documentation.

13 And yes, even Mrs. Porter told you and acknowledged  
14 to you the importance of documentation. She acknowledged that  
15 if it's not documented, it didn't happen. If it's not  
16 documented, she didn't have the conversation with Mr. Rosario.  
17 If it's not documented, she didn't make those fundamental  
18 important and critical observations of his medical condition.  
19 And Sheriff Cabral also told you what she thought about  
20 Mrs. Porter's reporting violations. It was unacceptable to her  
21 that a contract worker at the House of Correction would not  
22 submit a timely report of inmate abuse when ordered to do so by  
23 a Deputy Superintendent. And you know she didn't come to that  
24 notion overnight. She told you when she testified -- Sheriff  
25 Cabral -- that when she became Sheriff, she began to implement

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1 You know from the testimony in this case that on  
2 May 21st, when Stan Wojtkowski had his conversation with Agent  
3 Snyder outside the Nashua Street Jail, he was there for the  
4 purposes of providing documents and evidence requested by the  
5 FBI to give it to Agent Kelly. That's why he was there. You  
6 know that when Sheriff Cabral came into the department in  
7 November of 2002, she was aware of the FBI investigation into  
8 allegations of misconduct at the Nashua Street Jail and she  
9 directed her staff to cooperate and provide whatever assistance  
10 was necessary. And they did. And you know that when she came  
11 onboard in November of 2002, she became aware of the joint  
12 investigation that had stalled under the prior administration,  
13 an investigation into drug dealing at the House of Correction.  
14 And Sheriff Cabral restarted that. She made the effort. She  
15 contacted the FBI. She was one who directed her Chief of  
16 Investigations to get that investigation back on track. And it  
17 was and it did. Barring Mrs. Porter because she spoke to the  
18 FBI would be completely inconsistent with every single step  
19 this Sheriff has taken to enhance professionalism in her office  
20 or to work collaboratively with outside agencies, including the  
21 FBI.

22 Mrs. Porter wants you to believe that because there  
23 was a difference of opinion with respect to one aspect of this  
24 joint investigation with the FBI, that somehow Sheriff Cabral  
25 decided to retaliate against her. And as evidence of that,

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1 significant and substantial reforms in the Sheriff's  
2 Department, reforms that went to hiring, training, discipline,  
3 promotion, reforms, I suggest to you, ladies and gentlemen,  
4 that were necessary and important to enhance the  
5 professionalism and accountability of the Suffolk County  
6 Sheriff's Department; and reforms, ladies and gentlemen, that  
7 are fundamentally necessary to the mission of the department  
8 which is the care and custody of the inmates incarcerated  
9 there; and reforms, ladies and gentlemen, as Sheriff Cabral  
10 testified the other day, that would be rendered meaningless if  
11 employees and contract workers were not required to comply with  
12 department policy and report allegations of abuse internally.  
13 So, what did Sheriff Cabral do? She told you what she did  
14 based upon the conduct as she knew it. She barred Mrs. Porter,  
15 the only decision that was consonant with her focus of what she  
16 wanted to do with the department with respect to reforming and  
17 enhancing the professionalism and accountability. Sheriff  
18 Cabral did what she thought was right for the department.  
19 Mrs. Porter wants you to believe that Sheriff Cabral barred her  
20 in retaliation for speaking with the FBI. But you know that  
21 upon taking office as Sheriff in November of 2002, she began  
22 immediately to partner with and work collaboratively with  
23 outside law enforcement agencies, the Boston Police Department,  
24 the Suffolk County District Attorney's Office, the Attorney  
25 General's Office, the State Police and, yes, the FBI.

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1 Mr. Savage, I guess, offers to you an animated conversation  
2 that occurred between an Assistant United States Attorney,  
3 Sheriff Cabral, and Viktor Theiss approximately three weeks  
4 before Sheriff Cabral learns that Mrs. Porter has communicated  
5 with the FBI. Ask yourself: Does that make sense that this  
6 Sheriff, this reformer, this civil rights prosecutor, this  
7 defender of victims' rights would retaliate against  
8 Mrs. Porter, someone who she did not know because they provided  
9 information to the FBI? I suggest to you it does not make  
10 sense. It simply does not make sense.

11 What did Sheriff Cabral say about this conduct of  
12 Mrs. Porter and what she decided to do. Sheriff Cabral has  
13 articulated her concerns about Mrs. Porter's conduct from the  
14 moment she learned of it. She articulated those concerns to  
15 Viktor Theiss, to Elizabeth Keeley on June 10th when Sheriff  
16 Cabral made the decision to bar Mrs. Porter. Her focus has  
17 always been on Mrs. Porter's conduct, what Mrs. Porter did and  
18 what she didn't do, not her reporting to the FBI.

19 Mrs. Porter's reporting to the FBI was a footnote.  
20 It was not the focus. Its only relevance was that it was the  
21 means by which the department came to be aware that Mrs. Porter  
22 had not reported internally, had not complied with her  
23 obligation to report internally. Sheriff Cabral did not focus  
24 on the confidential communication provision of S-220. Indeed,  
25 she didn't focus on any particular provision of any department

5 (Pages 11 to 14)

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<p style="text-align: right;">Page 15</p> <p>1 policy when she made the decision to bar Mrs. Porter. She 2 didn't consult with Viktor Theiss regarding that decision. She 3 didn't consult with Mary Ellen Mastrorilli regarding that 4 decision. And indeed, I suggest to you that she really didn't 5 consult with Elizabeth Keeley. Sheriff Cabral spoke her 6 thoughts to Mrs. Keeley and then spoke her decision. She must 7 be barred. She should be barred.</p> <p>8 Indeed, when there is any consensus regarding what 9 was discussed during the June 16th meeting at the United States 10 Attorney's Office, it is this. It is with reference to the 11 concerns underscored by Sheriff Cabral regarding Mrs. Porter's 12 failure to comply with department policy concerning reporting 13 and documentation.</p> <p>14 And you have heard some testimony that 15 Mrs. Porter's provision of information to an outside agency was 16 discussed at the June 16th, 2003, meeting. And indeed, at the 17 meeting, it would have been only one person who took notes, 18 albeit after the fact does not have a specific recollection of 19 what exactly was discussed and communicated.</p> <p>20 You've also heard some testimony that Mary Ellen 21 Mastrorilli wanted to bar Mrs. Porter for communicating with an 22 outside agency or that Viktor Theiss reports to hear from 23 Sheriff Cabral that one of the reasons for her barring was that 24 Mrs. Porter had reported to the FBI and not reported inside.</p> <p>25 In light of all of the evidence as it's been</p>	<p style="text-align: right;">Page 17</p> <p>1 with with respect to her job as a Nurse Practitioner and 2 contract worker at the House of Correction, she made a series 3 of bad judgments and bad decisions, conduct, ladies and 4 gentlemen, that in Sheriff Cabral's estimation warranted her 5 barring even if she didn't talk to the FBI.</p> <p>6 First, Mrs. Porter decided not to document 7 Mr. Rosario's medical records. They made the decision not to 8 document his charts with a significant finding and observations 9 that she had made regarding his medical condition. You know. 10 You heard the evidence. She spoke with Mr. Rosario long enough 11 and close enough at his cell door to make the significant 12 observations that appeared in a document that's dated May 19th, 13 10 centimeter bruise on the chest. You heard Mrs. Porter. She 14 used her hand to measure it. Ten centimeter bruise on the 15 chest, 10 to 15 centimeter bruise on the bicep. She made 16 specific notations of the color of the injuries, their 17 location, their size, their freshness. Indeed, the plaintiff's 18 own witness, Donna Jurdak, the Health Service Administrator for 19 Correctional Medical Services at the House of Correction, when 20 pressed on cross-examination, acknowledged what we all knew -- 21 what we all knew, that these observations by Mrs. Porter were 22 significant findings that she was required to document. The 23 absence of a physical examination did not make these findings 24 any less significant nor did they obviate the need for her to 25 document them. Mrs. Porter was trained on the necessity of</p>
<p style="text-align: right;">Page 16</p> <p>1 produced during the course of this trial, I suggest to you that 2 that testimony is not sufficient for you to conclude that 3 Mrs. Porter's communications with the FBI was a substantial or 4 a motivating factor in Sheriff Cabral's decision to bar 5 Mrs. Porter.</p> <p>6 However, should you determine that -- should you 7 determine that Mrs. Porter's communications with the FBI was a 8 substantial or motivating factor in Sheriff Cabral's decision 9 to bar Mrs. Porter from the House of Correction, then I suggest 10 to you that by a preponderance of the evidence, Sheriff Cabral 11 has established that she would have taken the same action 12 regardless of whether or not Mrs. Porter had communicated with 13 the FBI. She would have barred Mrs. Porter even if she hadn't 14 communicated with the FBI. Why? Because her conduct warranted 15 it.</p> <p>16 Indeed, what we have learned during the course of 17 this trial is that Sheriff Cabral got it right. Mrs. Porter 18 was a Nurse Practitioner employed by Correctional Medical 19 Services to provide health care to inmates incarcerated at the 20 House of Correction. Her primary obligation, indeed her sole 21 obligation was to help her patients, the inmates at the House 22 of Correction. No one is questioning her expertise or her 23 qualifications as a Nurse Practitioner. And, indeed, no one is 24 suggesting that is she not well-intentioned. However, despite 25 the obligations that everyone agrees she was required to comply</p>	<p style="text-align: right;">Page 18</p> <p>1 proper documentation and the fact that all of these significant 2 findings and then the fact that all the significant findings 3 were required to be documented in the chart. She didn't do 4 so. She decided not to do so.</p> <p>5 Ladies and gentlemen, I invite you to look at the 6 medical records. Look at the medical records, ladies and 7 gentlemen. When you go back to the jury room, look at them. 8 Look at the kinds of information that is contained within those 9 medical records and look at what the information is that's 10 contained in Mrs. Porter's 5-19 Progress Notes. Look at the 11 observations that she made that she reported. Look at the 12 observations that are recorded and made in Mr. Rosario's 13 medical records. Look with particular attention at the 14 notation on May 28th by a nurse who was on the 142 unit, not in 15 the infirmary. She encountered Mr. Rosario. He says to her 16 "I've been beaten, I've been assaulted, I've got an injury." 17 She specifically records that conversation in the medical 18 records and then later she records her observations of the 19 injuries.</p> <p>20 Ladies and gentlemen, it is undisputed the findings 21 that Mrs. Porter made regarding Mr. Rosario's medical condition 22 that she noted in that document dated May 19 were exactly the 23 kinds of things that she was required to document in 24 Mr. Rosario's medical file and she chose not to do it.</p> <p>25 Mrs. Porter decided not to do a physical</p>



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<p style="text-align: right;">Page 19</p> <p>1 examination of Mr. Rosario despite the fact that she knew that  2 it was the only way to fully evaluate what his medical  3 condition was, to allow her to more completely evaluate it.  4 She decided not to do an exam. She decided that rather than  5 conduct an exam and report those results, that Mr. Rosario  6 would be better served by contacting the FBI on May 20th. Her  7 obligation was to her papers. Her obligation was to that  8 inmate. Her obligation was to report that inmate's allegations  9 internally and to report what she saw about them. And she did  10 not do so. Instead, she decided to leave the examination for  11 someone else who didn't have a history of Mr. Rosario. That's  12 not sufficient. Mrs. Porter decided not to report  13 Mr. Rosario's allegation to SID, an obligation that everyone  14 acknowledged that she had. Indeed, Agent Snyder testified  15 here that she always informed Mrs. Porter that she was required  16 to meet the reporting requirements of the department. Agent  17 Snyder further testified that despite the fact that she had  18 passed on some information to SID in this instance on this case  19 did not absolve Mrs. Porter of her obligation to report the  20 allegations of abuse internally to SID.  21 You recall that on cross-examination, Mrs. Porter  22 was reluctant to admit what she had acknowledged in her own  23 deposition testimony, that she had an obligation to report the  24 allegations of abuse internally to SID. You will recall  25 further how she acknowledged that she withheld information from</p>	<p style="text-align: right;">Page 21</p> <p>1 and it's a policy that requires that reports be submitted in  2 writing by the end of one's shift or by the end of the day and  3 that the report shall be submitted to one's supervisor unless  4 specifically directed otherwise. Mrs. Porter was directed on  5 May 19th to provide a written report to Deputy Superintendent  6 Mastrorilli and it doesn't get there until May 28th.  7 Mrs. Porter has provided a number of inconsistent explanations  8 for why that is, why the report was not submitted when it was  9 requested. And I suggest to you that none of them are  10 satisfactory. She first says it wasn't finished when Donna  11 Jurdak comes to her office and informed her that a report is  12 being requested. She doesn't tell Donna Jurdak to wait, I'm  13 almost done. You saw the report. It's barely two pages long.  14 Or she tells you that when she finished the report, she went to  15 go give it to Mrs. Jurdak, but Mrs. Jurdak had left for the day  16 or she was in a meeting or she tells you that she didn't bring  17 the report directly to Deputy Superintendent Mastrorilli who  18 had requested it, because it did not occur to her or she didn't  19 bring it to her because she had forgot it at home, a report  20 that she said she had completed or tells you that she puts in  21 her briefcase, brings home, takes it out, even though she is  22 not going to revise it, places it on her computer, and then  23 forgets it for three days. Consider those explanations when  24 you evaluate Mrs. Porter's credibility. Mrs. Porter knew that  25 she was required to comply with department policies. She knew</p>
<p style="text-align: right;">Page 20</p> <p>1 the SID investigators, Brian Dacey and Sonya Aleman. In  2 speaking to her on May 22nd, she does not tell them that Mary  3 Ellen Mastrorilli requested a report. She does not tell them.  4 She also stated that if she had already provided the report to  5 Donna Jurdak, she probably would not have shared that  6 information with the investigators. If she had already  7 provided the report to Mrs. Jurdak, she probably would not have  8 shared that piece of information to Brian Dacey and Sonya  9 Aleman, the two investigators charged with the responsibility  10 to investigate Mr. Rosario's allegations of abuse. Instead,  11 Mrs. Porter and Mrs. Jurdak decided that the matter should be  12 reported. Mrs. Porter now designated herself the gatekeeper of  13 what information gets reported to SID and whatever information  14 gets reported. Mrs. Porter further decided when she was going  15 to turn in the report that had been requested by Deputy  16 Superintendent Mastrorilli. It is undisputed that on May 19th,  17 2003, Deputy Superintendent Mastrorilli directed Mrs. Porter to  18 provide a written report of her encounter with Mr. Rosario. It  19 is further undisputed that that report was received by Deputy  20 Superintendent Mastrorilli and SID on May 28th, nine days  21 later.  22 It is equally undisputed, ladies and gentlemen,  23 that policy S-220, I think the provision that hopefully is  24 before you on the screen right now, is a policy that  25 Mrs. Porter acknowledges that she was required to comply with</p>	<p style="text-align: right;">Page 22</p> <p>1 that she could be barred from the House of Correction at any  2 time for a violation of department policy. Under cross-  3 examination, Mrs. Porter acknowledged that the late filing of a  4 report was in violation of policy S-220, a policy that she  5 acknowledged that she is required to comply with. And by her  6 own testimony, she acknowledges the report that she was  7 directed to write and provide on May 19th, by her testimony,  8 wasn't provided until May 25th. That's a violation,  9 notwithstanding the fact that the evidence clearly establishes  10 the report doesn't get where it's supposed to go until May  11 28th.  12 It is equally clear that Sheriff Cabral would have  13 barred Mrs. Porter for her conduct regardless of the protected  14 activity that Mrs. Porter engaged in. She viewed Mrs. Porter's  15 failure to document her observations of Mr. Rosario's medical  16 condition in the medical chart after he had reported to her  17 that he had been assaulted by an officer as a serious  18 dereliction of her responsibility as a contract Nurse  19 Practitioner. Sheriff Cabral had every expectation, based upon  20 her own experience as a prosecutor, that Mrs. Porter's  21 observations would be recorded in Mr. Rosario's medical  22 records. Deputy Superintendent Mastrorilli thought that as  23 well. So did the Chief of Staff Elizabeth Keeley. And indeed  24 Donna Jurdak acknowledged that these findings should be in the  25 medical records. Agent Snyder acknowledged it. She testified</p>



<p style="text-align: right;">Page 23</p> <p>1 the first thing she does is go to the medical records. And  2 indeed, Brian Dacey and Sonya Aleman, when they commenced their  3 investigation into Mr. Rosario's allegations, went first to the  4 medical records. Conspicuously absent was anything from  5 Mrs. Porter. This dereliction of her responsibility was  6 compounded by the late reporting, by the failure to provide  7 that written document when it was requested. These aren't  8 pretextual reasons, ladies and gentlemen. Sheriff Cabral, as  9 you know, has taken similar acts with respect to a Physician's  10 Assistant at the Nashua Street Jail and a member of the Clergy  11 at the House of Correction. The message is clear: If you do  12 not recognize the importance of reporting or documentation or  13 choose not to comply with department policies regarding the  14 necessity to report allegations of abuse internally, then you  15 no longer have the privilege of working at the House of  16 Correction.</p> <p>17 Now, the plaintiff may say "what about Craig  18 Meekins, what about Gayle Bartley, what about Beth Bringola,  19 where are their reports? Look at the medical records. They  20 did their job. Craig Meekins filled out a report, medical  21 observation after use of force form. Beth Bringola did a  22 document that defined it. Gayle Bartley documented her  23 findings. Mrs. Porter's conduct was not mere paperwork. It  24 was a technical violation. To suggest that a failure to comply  25 with department policy regarding the reporting of inmate abuse</p>	<p style="text-align: right;">Page 25</p> <p>1 company was that had the contract for health care services at  2 the House of Correction. She knew that she could be barred at  3 any time for violations of department policy. And despite the  4 fact that she obtained full-time employment at CMS within  5 several months of being barred, a job that provided her with  6 benefits, she decided to leave that position. It was her  7 choice to take a job in which she worked fewer hours, was  8 closer to her home, and provided her with more flexibility.  9 Mrs. Porter has not been denied employment and malpractice  10 insurance as a result of her barring. She has not lost her  11 professional license. There have been no complaints filed  12 against her with the Board of Registration and Nursing. Her  13 hourly wages have increased. Certainly, anybody who is  14 terminated from their employment or separated from a job that  15 they care about would be upset even if they do not agree that  16 there was cause for that separation.</p> <p>17 And while Mrs. Porter saw a therapist, it was for  18 eight visits. There was no medication. There has been no  19 followup treatment. And if you look at the records from those  20 therapy sessions which ended, I believe, in September 2003, you  21 will come to the conclusion that there were a number of issues  22 that were discussed that were separate and apart from the  23 barring from the House of Correction.</p> <p>24 Finally, it is simply not reasonable for  25 Mrs. Porter to accuse the Sheriff of causing her harm as a</p>
<p style="text-align: right;">Page 24</p> <p>1 internally or that a failure to document an inmate's medical  2 record is mere paperwork trivializes the essential important  3 obligations that this Sheriff has to the care and custody of  4 the 2300 men and women incarcerated at the Suffolk County  5 Sheriff's Department. Indeed, where there is any consensus  6 regarding what was discussed at that June 16th, 2003, meeting,  7 it was with reference to the concerns underscored by Sheriff  8 Cabral regarding Mrs. Porter's failure to document  9 Mr. Rosario's medical records and her late reporting. And  10 indeed, the necessity of documentation and reporting  11 allegations of abuse internally was stressed by Sheriff Cabral  12 in a response to a suggestion by the United States Attorney  13 that she sent out in an E-mail to her staff telling them that  14 they should report allegations of abuse externally. You heard  15 her response. She would not and could not relieve her staff of  16 their obligation to report allegations of abuse internally.  17 Sheriff Cabral would not abdicate her obligations to protect  18 the inmates entrusted to her care.</p> <p>19 Mrs. Porter wants you to believe that she has  20 suffered injuries caused by Sheriff Cabral and Suffolk County  21 as a result of her barring. Bear in mind, ladies and  22 gentlemen, that Mrs. Porter did not have a written contract  23 with Correctional Medical Services while she was working at the  24 House of Correction. And, therefore, there was no guarantee  25 that she would continue to work for CMS or whomever the next</p>	<p style="text-align: right;">Page 26</p> <p>1 result of the Sheriff's very measured and restrained response  2 to Mrs. Porter's public allegations of illegal conduct and  3 improper conduct. Fifteen months after she was barred from the  4 House of Correction, Mrs. Porter of her own volition granted  5 interviews with the Boston Globe and Channel 5 in which she  6 accused Sheriff Cabral of illegal conduct. You have seen and  7 you have heard the Sheriff's response to those allegations of  8 illegal conduct made by Mrs. Porter in two very public forums.  9 Mrs. Porter wants you to believe that she was upset over a  10 debate that she neither saw nor heard. She wants you to  11 believe that the press statement issued by Sheriff Cabral in  12 response to the public accusations of illegal conduct caused  13 her harm. These claims, ladies and gentlemen, are simply not  14 reasonable and I urge you to disregard them.</p> <p>15 Your job in this case is to decide what motivated  16 Sheriff Cabral's decision to bar Mrs. Porter from the House of  17 Correction, not whether the outcome was too severe or too  18 extreme, not whether you would have chosen to do something  19 different. That is not something that is within your purview.</p> <p>20 I suggest to you, also, ladies and gentlemen, the  21 only witness whose opinion matters concerning the reasons for  22 the barring is Sheriff Cabral and Sheriff Cabral alone. What  23 others may have thought, different things, is not relevant to  24 your consideration. It was her decision and her opinion as  25 articulated by her.</p>

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1 The evidence in this case establishes by a  
 2 preponderance of the evidence, ladies and gentlemen, that  
 3 Sheriff Cabral barred Mrs. Porter solely on the basis of her  
 4 conduct and barred her because of that conduct regardless of  
 5 her communications with the FBI. When you are the Sheriff of  
 6 Suffolk County with 1100 employees and the ultimate  
 7 responsibility for the care and custody of 2300 male and female  
 8 inmates incarcerated there, you are within your rights to  
 9 expect that a contract worker would document significant  
 10 findings in an inmate's medical record, and you are within your  
 11 rights to expect that when a report is requested and directed  
 12 to be provided, you will get it.

13 Ladies and gentlemen, the evidence in this case  
 14 supports one verdict and only one verdict, and that is a  
 15 verdict of favor of Sheriff Cabral and Suffolk County. And I  
 16 urge you, when you go into that deliberation room, to consider  
 17 the evidence and return the only verdict that is just, and that  
 18 is a verdict in favor of my client, Sheriff Cabral and Suffolk  
 19 County. Thank you.

20 THE COURT: Thank you, Ms. Caulo.  
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 24  
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1 CLOSING ARGUMENT ON BEHALF OF PLAINTIFF  
 2 BY MR. SAVAGE:  
 3 Good morning.  
 4 Ms. Caulo is right about one thing. This case does  
 5 turn on what is credible, what's the credible evidence. She's  
 6 absolutely and fundamentally wrong about something else, which  
 7 is what is the question here. She has beaten the drum on the  
 8 issue of were there violations. But the only question here is  
 9 were there violations that would cause somebody to be barred  
 10 and for what. And after two witnesses in this case, after  
 11 Ms. Mary Ellen Mastrorilli and after Donna Jurdak, we all know  
 12 the answer. And the answer is no. We don't have to sort out  
 13 whether there were or were not violations, because both  
 14 Ms. Mastrorilli and Ms. Jurdak say whatever happened here is  
 15 not a basis for barring her for life.

16 Let's just step back a little and think about what  
 17 we have heard for the last week and a half. And it really goes  
 18 back to that old saying, you know, if you're not part of the  
 19 solution, you're part of the problem. Sheila Porter refused to  
 20 be part of the problem whether Sheriff Cabral liked it or not.  
 21 And, so, even though Sheriff Cabral was angry and in a heated  
 22 dispute with the FBI over a drug case where she felt left out,  
 23 Sheila Porter was still going to speak up and meet her duty as  
 24 a Nurse Practitioner to tell the FBI that a prisoner was in  
 25 danger whether Andrea Cabral liked it or not. And she didn't

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1 like it at all. You heard from three witnesses, witnesses  
 2 basically not addressed in the argument you just heard, who  
 3 directly told you that talking to an outside agency was part of  
 4 Sheriff Cabral's reason for barring Sheila Porter for life from  
 5 the Suffolk County House of Corrections. You heard it directly  
 6 from colleagues who have been her friends for years: Viktor  
 7 Theiss, Elizabeth Keeley, and Gerry Leone.

8 And Mrs. Porter and I want to step back and thank  
 9 you for the week and a half you've spent here silently judging  
 10 the facts. Thank you very much. It's a sacrifice. We know  
 11 it. But also in this case, it's an opportunity. I think the  
 12 greatest experience — probably the greatest exhilaration and  
 13 fulfillment a human being could have is to lift the pain and  
 14 anguish off another human being if it can be lawfully done. In  
 15 a few minutes, I'm going to ask you after years to lift the  
 16 pain and the humiliation and the suffering from Sheila Porter  
 17 and her family. If you do, then I submit to you the evidence  
 18 here demonstrates you must. You will have done something good  
 19 and right, something you can carry with you always in this  
 20 building. It's been a pleasure for me to try a case for you in  
 21 this courthouse, not just because the elevators work and the  
 22 coffee is okay, but because this building itself speaks about  
 23 this case, about Sheila Porter's situation, her struggle, ours.  
 24 On the wall downstairs in the jury selection room, there's a  
 25 quote by Justice Holmes. It's part of an opinion he wrote that

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1 spoke to the fact that for those in charge, for those who have  
 2 no doubt of their ideas on their power, it's natural to sweep  
 3 away those who speak out. But Justice Holmes said, "The truth  
 4 comes out better for all of us if all of us can speak freely."  
 5 He went on to say, "That idea of free speech is at any rate the  
 6 theory of our constitution. It's an experiment. All of life  
 7 is an experiment. And at least while that experiment is part  
 8 of our system," Justice Holmes said, "I think we should be  
 9 terminably vigilant against attempts to check those who express  
 10 themselves." So, I ask each of you to be vigilant as we review  
 11 what happened here. And there are just two questions: Why did  
 12 Andrea Cabral ruin Sheila Porter's life and what does the law  
 13 say you can do about it? Andrea Cabral did it because Sheila  
 14 Porter spoke to the FBI. There's no question that was part of  
 15 the reason Andrea Cabral fired Sheila Porter for life. It's  
 16 the only reason that makes sense of all of the facts in the  
 17 case. It's a reason Viktor Theiss, Elizabeth Keeley and Gerry  
 18 Leone told you was the Sheriff's reason at the time. And  
 19 that's really important. What did Andrea Cabral say and  
 20 believe at the time, not what's the reason that's being given  
 21 now in litigation? Here she says the FBI had no role, but the  
 22 evidence is all to the contrary. On that fact, Andrea Cabral  
 23 is an island. She is alone. And there is nobody, common sense  
 24 tells us, that she can put her relationship and interaction  
 25 with the FBI in June of 2003 out of her head.

<p style="text-align: right;">Page 31</p> <p>1 Now, this case isn't about the rules violations or 2 that somebody could or would or should bar Sheila Porter for 3 paperwork reasons. The case is about did the Sheriff bar 4 Sheila Porter in part for another reason, talking to the FBI? 5 So we don't have to sort out whether Donna Jurdak or Sheila 6 Porter, who wrote the rules that teach medical documentation 7 know more about the right way to document, than the Sheriff 8 does. But they do. And we don't need to spend time on whether 9 Mary Ellen Mastrorilli and Donna Jurdak know more than the 10 Sheriff about how the medical unit was run, what reports were 11 handed in and when, what was a real violation, and what was a 12 technical problem. They clearly know that Andrea Cabral does. 13 All you need to do here is look at what the Sheriff herself 14 said she did. Look at whether her first explanation in June 15 2003 with the barring had to do with Sheila Porter talking to 16 the FBI makes more sense than the present explanation that it 17 was paperwork. And why is there a lifetime ban? Was it really 18 because of a one-time error by a clinician with 34 years 19 experience who was the best nurse practitioner that Donna 20 Jurdak had or was it partially because Sheila Porter spoke to 21 the FBI? 22 Three weeks after, Andrea Cabral had a huge fight 23 over an FBI investigation, the latest blowup in a historically 24 bad relationship between the Suffolk County Sheriff's 25 Department and federal law enforcement.</p>	<p style="text-align: right;">Page 33</p> <p>1 FBI informants in her jail. Why is this the only barring ever 2 for paperwork reasons? 3 You remember Mary Ellen Mastrorilli, Donna Jurdak 4 and even Andrea Cabral said there never had been a firing for 5 paperwork-related reasons. And that's because it's not the 6 only reason. And the two barrings that were just reported that 7 occurred in 2005 after Mrs. Porter are both cases where 8 contract workers filed false reports where the contents of 9 their reports were false about what their interaction with the 10 inmates was. That's not what's being said about Mrs. Porter 11 here. Why is this the only barring that Andrea Cabral can 12 recall even being involved in? Because the FBI is her issue. 13 In June 2003, there was extreme displeasure with 14 federal law enforcement. If these paperwork reasons were real 15 and serious, then why not treat them that way. Why not 16 investigate how the medical unit is run? Why not discipline 17 Mary Ellen Mastrorilli and Donna Jurdak who run the unit? Why 18 not tell Mrs. Porter's employer "what the heck is going on?" 19 Why not let the Board of Nursing know? Why let Mrs. Porter get 20 immediately hired by other Sheriffs? If this is real, then she 21 should have rung the bell. There should have been an alarm 22 that went off. This is real! It's not, ladies and gentlemen. 23 It's not. Why would she bar somebody for a paperwork issue 24 when everybody knew there was no harm to any investigation? 25 Why just Mrs. Porter when other people in this investigation</p>
<p style="text-align: right;">Page 32</p> <p>1 So, let's review some facts. They all show that 2 talking to the FBI was part of the reason Mrs. Porter was 3 fired. But fact number one: Why is it the Sheriff now can't 4 even vaguely recall the meetings where the reasons were 5 discussed, not the meeting with Elizabeth Keeley, not the 6 meeting with Viktor Theiss, not clearly the meeting on June 7 16th? I mean, why she was able to get on the witness stand was 8 apparently the FBI was talked about in the June 16th meeting. 9 That was to her face. She was talking. She can't recall 10 hearing it or saying it? Do you think there is any chance you 11 forget what you say if five federal law enforcement agents were 12 accusing you of barring Mrs. Porter of being an FBI informant? 13 If this is about the filing of papers, why did the Sheriff 14 disrupt medical care of the inmates by forcing Mrs. Porter off 15 the facility with no transitional care? You remember 16 Mrs. Porter worked for free to help Donna Jurdak keep that unit 17 going. If it's really about filing the forms, why not say 18 you're gone when we get your replacement? Because it's not 19 about filing the forms. It about talking to the FBI. Why 20 didn't Andrea Cabral consider a lesser sanction if this is 21 really about the paperwork? Because no lesser sanction would 22 address the real problem -- talking to the FBI. Why not really 23 be part of law enforcement and encourage Sheila Porter to 24 become an FBI informant, to build on a relationship, whatever 25 it was that Andrea Cabral knew about? Because she didn't want</p>	<p style="text-align: right;">Page 34</p> <p>1 filed reports late or didn't file all the reports they were 2 supposed to file? Why make a decision based on facts that 3 Sheriff Cabral acknowledged to you turned out to be wrong? Why 4 not find out the truth? The answer is always the same. And 5 it's that Sheila Porter admitted talking to Christa Snyder, the 6 FBI agent. Just think about what you heard. Andrea Cabral 7 said she spent hours interviewing new hires. And this is the 8 first case of inmate abuse and she can't even take the time to 9 read the file. She didn't need to read the file. She knew the 10 facts she needed to know. Mrs. Porter said she spoke to the 11 FBI. She never looked at the file. She had a passing 12 conversation with Viktor Theiss who gave her all she needed to 13 know. And with a flick of the wrist, Sheila Porter is barred. 14 Also remember what I explored on cross-examination, the fact 15 that Andrea Cabral's reasons keep changing. She can't remember 16 whether it was or wasn't part of the reason that the thing was 17 home on the computer. In her deposition in May, she said 18 putting it on the wrong form was a reason. Here she said, 19 "well, I mean that's part of the reason, the other three 20 reasons I've given you." When she went to the June 16th 21 meeting, she never said backdating was a reason. Why do these 22 reasons keep moving. Because I submit to you they are not the 23 whole reason. The FBI is part of the reason. It's the only 24 reason that explains all the facts in the case. 25 But now let's go directly to the very heart of it.</p>

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<p style="text-align: right;">Page 35</p> <p>1 What do Keeley, Theiss and Leone all say that Andrea Cabral 2 said in June of 2003 -- 2003? They were all on the same page. 3 She said the FBI is part of it. It's crystal clear that 4 talking to the FBI is part of the reason. 5 Let's review Ms. Keeley. First, think about her 6 demeanor. How hard was it for me to try and get direct answers 7 from her? Clearly, she did not want to admit to you the truth 8 and hurt her long-time friend and boss. But she had to. And 9 she said on June 10th, she discussed with Andrea Cabral that 10 Sheila Porter went outside of the department with confidential 11 information. She said, in speaking to an outside agency, that 12 it was integral to the decision. It was significant. It was 13 important. She said she relayed the reasons to Mary Ellen 14 Mastroilli on June 10th, the same day. And you heard what 15 Mary Ellen Mastroilli said. The reason was Mrs. Porter had 16 spoken to the FBI. Elizabeth Keeley said she repeated the 17 Sheriff's reasons again on June 12th to Gerry Leone in the 18 telephone call setting up the June 16th meeting. And again, 19 the reason is, in part, talking to the FBI. And then at the 20 June 16th meeting, again, Elizabeth Keeley recalls -- because 21 it was repeated -- that "part of the problem was that Porter 22 spoke to an outside agency." Now Andrea Cabral is sitting 23 right there. Andrea Cabral is talking about this topic. And 24 her answer to you was, "Well, apparently it was said." She 25 forgot this? Do you buy that?</p>	<p style="text-align: right;">Page 37</p> <p>1 there was a meeting that Andrea Cabral did say one of the 2 reasons was talking to an outside agency. He had to go on and 3 admit that he had testified falsely to us in May. We tried and 4 tried. When we found out about it, he had to tell the truth. 5 He could no longer help Andrea Cabral by testifying falsely. 6 He got caught and he's going to face whatever consequences 7 there are. But nobody would risk those consequences if they 8 weren't caught and forced to tell you the truth. 9 So, what is the truth again? There was a meeting 10 June 16th in this building. And one reason for the Sheriff's 11 decision was talking to the FBI. And there was a second 12 reason. Elizabeth Keeley and Viktor Theiss and Andrea Cabral 13 and again the Sheriff, in her own mind, said that that was one 14 of the reasons. You saw Sheriff Cabral's response to that on 15 the witness stand yesterday. She shrugged and then simply 16 denied that meeting. How ironically that the man Andrea Cabral 17 relied solely upon to ruin Sheila Porter's life provides 18 information that, all alone, is enough for you to give her that 19 life back. 20 Finally, as to the direct words out of Sheriff 21 Cabral's mouth is the testimony you heard of Gerry Leone. He 22 is not in the same boat as Viktor Theiss and Elizabeth Keeley 23 and you could tell from his demeanor on the stand. It didn't 24 have to be dragged out of him. He hasn't hidden anything 25 before. He wasn't trying to weave or duck. He was simply a</p>
<p style="text-align: right;">Page 36</p> <p>1 Viktor Theiss. He's at the June 16th meeting. 2 There's three people there: Theiss, Keeley, Cabral and the 3 Suffolk County Sheriff's Department. He doesn't recall who was 4 speaking, but he recalls clearly, answer, "I recall two reasons 5 being provided, which was failure to document a medical record 6 and going to the FBI without notifying the department." And 7 then there is Mr. Theiss' testimony of the later week that just 8 had Elizabeth Keeley, himself, and Sheriff Cabral. And he says 9 that Sheriff Cabral repeated those same two reasons. Notifying 10 the FBI was part of it. It was part of that meeting. It was 11 part of that discussion. And recall Viktor Theiss' demeanor on 12 the stand. I submit to you he was a subdued and broken man who 13 was in big trouble. Andrea Cabral put him in the hot seat by 14 incorrectly answering the interrogatory that Viktor Theiss was 15 the only one consulted on the barring. So, in May 2005 when he 16 was asked questions in this case under oath about all of the 17 conversations he had with Andrea Cabral, about the reasons for 18 the barring, he did not tell the truth. He hid the fact that 19 Andrea Cabral, Liz Keeley and himself had that meeting after 20 June 16th. He hid the fact that one reason for the barring was 21 Mrs. Porter's contact with the FBI. He hid it for a reason: 22 Because this whole case turns on it. He had to hide it or the 23 Sheriff and the department are liable. But he got exposed 24 because there were other statements in January '05 where he 25 hadn't hidden it. And, so, he had to tell you the truth, that</p>	<p style="text-align: right;">Page 38</p> <p>1 friend of Andrea Cabral's for years who happens to recall the 2 June 16th meeting clearly and he has notes. He told you how it 3 got set up. June 12th, there's a telephone conversation with 4 Elizabeth Keeley where she gives the reasons that include 5 speaking to an outside agency. Quote, "they have been 6 disclosed" -- "the information had been disclosed 7 inappropriately to an outside agency." They set up the 8 meeting. And as you recall, Mr. Leone said first Elizabeth 9 Keeley gave the reasons three feet away from the Sheriff. They 10 included, among the reasons, that Mrs. Porter had spoken to an 11 outside agency. And then the Sheriff gave the reasons herself 12 and it included the same thing. I don't know if you remember 13 the testimony. But you remember Mr. Leone saying the crux of 14 the focus of the medical information was that medical 15 information had been disclosed outside the agency. So, both 16 Elizabeth Keeley and Andrea Cabral at that meeting said it was 17 one of the reasons. Gerry Leone was absolutely clear. This is 18 the Sheriff speaking as to her reasons. 19 You need no more, I submit to you, ladies and 20 gentlemen. End of story. She says it's absolutely not a 21 reason. It clearly was a reason. The later answers are 22 pretext. The interrogatories, the stories in the press that 23 Mrs. Porter is not a whistleblower for the FBI, they are 24 absolutely of no moment here. They don't make the Sheriff's 25 case.</p>



<p style="text-align: right;">Page 39</p> <p>1 So, let's turn to what the law permits you to do 2 about it. One of the questions on the verdict form is going to 3 go to damages. And here, the economic damages are pretty 4 straightforward. You heard Mrs. Porter testify that she's lost 5 \$79,000 since June 3rd -- June 10th, '03 until today. There's 6 basically no dispute about that. You also heard her testify 7 that, at present, for the past couple of years, she is making 8 \$29,000 a year less than at the House of Correction and that 9 she planned on working for 10 years. \$290,000 plus the 10 79,000 that she's out. The economic damages are pretty 11 straightforward, \$369,000.</p> <p>12 Now, Ms. Caulo says, "But, wait a minute. With 13 that number, you're not guaranteed that you would have worked 14 at the House of Correction." Correct, true. But it's also not 15 guaranteed that Mrs. Porter will only make \$29,000 less 16 forever. She could have lost her House of Correction job the 17 next day or she could lose the job she has today the next day. 18 She could fall down and get hurt. So, sure, you can start with 19 the number that she was making \$71,000 and she's not going to 20 make it for 10 years, so the damages are \$710,000. But 21 Ms. Cabral and the county got lucky, because Mrs. Porter is a 22 hard worker and she went and got a job and she's able to offset 23 this. But she can't offset it all and there's only one 24 reasonable number here on the evidence. And that's the 25 \$290,000.</p>	<p style="text-align: right;">Page 41</p> <p>1 to fill out having lost her security clearance, the loss of her 2 relationship with the FBI. She's an older, long-term 3 employee. That increases the suffering.</p> <p>4 Maybe another approach is: Is there something 5 greater or less than the economic harm that she's suffered? 6 Well, sure, there are some things that make it greater. The 7 pain is going to go on for more than 10 years. Even the 8 Sheriff recognized that there's special pain for civil rights 9 violations. Could it be less? Sure. Mrs. Porter is extremely 10 lucky to have strong family support that's made the suffering 11 less. And indeed, if you render a verdict in Mrs. Porter's 12 favor, it will lift the pain of some of the future suffering.</p> <p>13 So, it may be less. I can't tell you a number. I can simply 14 say that the law requires you to compensate her fairly.</p> <p>15 I have got even less guidance for you on the final 16 topic, which is punitive damages. Punitive damages are simply 17 what you say they are. The law permits you -- it does not 18 require you, but it permits you -- to send a message when 19 someone callously disregards the civil rights of another. Now, 20 here it's especially appropriate given that the acts were 21 committed by a civil rights prosecutor who demonstrates no 22 remorse. It is clear Sheriff Cabral will do this next week or 23 next year and as long as she is Sheriff. It's exactly how she 24 plans to run the facility. She needs to be given a message to 25 cut it out. But your message is also to others dealing with</p>
<p style="text-align: right;">Page 40</p> <p>1 The next thing you're going to have to consider is 2 the issue of emotional distress, the emotional suffering to 3 date, and whatever emotional suffering you conclude is likely 4 to continue for the rest of her life. And nobody can tell you 5 how to value emotional suffering or pain. There is no 6 marketplace for emotional distress. There's no way to fully 7 compensate. You have only got the limited tool the law gives 8 you, which is money damages.</p> <p>9 So, let me give a couple of thoughts, maybe ways to 10 approach it. One is you can think about if there was an ad in 11 the newspaper that offered -- Jim, can you put it up? I offer 12 a job with this description. You get to be "sleepless, 13 irritable, tearful, (agitated depression)" --</p> <p>14 THE COURT: Well, I tell you, I think this is 15 improper argument, Mr. Savage. And, so, take it off the 16 screen. The jury will disregard it. Move on to proper 17 argument.</p> <p>18 BY MR. SAVAGE:</p> <p>19 You've got to put a dollar figure on the feelings 20 that Mrs. Porter has. The flip side or another way to think of 21 it, how much should Mrs. Porter be paid to be relieved of the 22 suffering that she has? And when you conclude what adequate 23 compensation is, then you need to give that to Mrs. Porter. 24 Now you will recall the evidence. The anxiety, the agitation, 25 the humiliation, the loss of reputation, the form that she has</p>	<p style="text-align: right;">Page 42</p> <p>1 whistleblowers as well. We don't want a world, I submit, where 2 the Sheila Porters hesitate to help those in danger because 3 their bosses haven't gotten the message that they can't 4 retaliate. The amount needs to be related to the underlying 5 damage to support her. That's the way society has done the 6 punishment for these things. The ancient text "an eye for an 7 eye" or "ten plates under each of them," the Romans do it even 8 harsher. But it's got to be some number related to the 9 underlying harm. That's fundamentally the way human beings 10 approach punishment and deterrence. And I'm not going to 11 presume to suggest to you a number. But I will say you can't 12 avoid sending a message, because if the number is zero, that 13 sends a message, too, and I believe it's a long and dangerous 14 message based on the evidence in this case.</p> <p>15 So I need to ask you directly to do a few things. 16 You're going to have a verdict form. And the first question 17 is: Did Sheila Porter establish by a preponderance that her 18 protected speech was a reason for her barring? And I ask you 19 to answer that question "yes."</p> <p>20 As to the next question, did the Sheriff who stands 21 alone as an island somehow prove by a preponderance that she 22 would have barred Sheila Porter, anyway? And I ask you to 23 answer that "no."</p> <p>24 And then when it comes to the damages, I ask you to 25 give the compensatory damage figure of \$369,000, plus the</p>

<p style="text-align: right;">Page 43</p> <p>1 damage figure that you determine to be right for her pain and  2 suffering and to punish and deter. And this is it. You can't  3 come back two years from now and see how Sheila Porter is  4 coping. You can't come back the next time that Sheriff Cabral  5 violates someone's rights. And so with that, based on this  6 overwhelming evidence, I submit to you, ladies and gentlemen,  7 and I ask you to do what the law and the evidence allows.  8 Thank you each very much.</p> <p>9 THE COURT: Thank you, Mr. Savage.</p> <p>10 I think, ladies and gentlemen, before I charge,  11 we'll take a short break of 10 minutes or so. This is an  12 especially important time for you not to discuss this case.  13 And you'll understand that I am going to ask you, before I  14 start my instructions, whether or not you have had any  15 conversations, any communications, anything outside of this  16 court that bears on this case before we get to that final stage  17 of instructions. So, you can commensurate over the Patriots,  18 you can discuss the weather, but don't talk about this case  19 yet. So, we'll take 10 or 15 minutes.  20 (Jury out at 10:10 A.M.)</p> <p>21 THE COURT: You may be seated. I'm going to ask  22 Ms. Rynne to mark as Jury Exhibit Number 1 the writing that  23 dealt with the economic damages and also to have marked as Jury  24 Exhibit Number 2 -- I'm not quite sure how I would describe it  25 -- whatever it was that was put up in front of the jury that</p>	<p style="text-align: right;">Page 45</p> <p>1 must bring to the attention of the jury to avoid them being  2 drawn into an undertaking that they are not charged with here.  3 It is one of the problems generally in the area of punitive  4 damages. It's one of the reasons that the Supreme Court has  5 attempted to provide some guidance in this area.</p> <p>6 So, anything else before we bring the jury in?  7 MR. SAVAGE: Can I be heard on that at a later  8 point, Your Honor?  9 THE COURT: You may.</p> <p>10 MR. SAVAGE: My understanding of the law is that  11 they have to take it into account the deterrent message.  12 THE COURT: They do. You didn't say deterrence.  13 You said deliver a message. And deliver a message involves  14 something else. Deliver a message says you have the writ to be  15 the punishers of a society. And that is improper argument.</p> <p>16 MR. SAVAGE: Well, I also repeatedly said  17 deterrence, Your Honor.  18 THE COURT: Not repeatedly. You did say deterrence  19 on occasion. But what you said repeatedly was "deliver a  20 message."  21 MR. SAVAGE: Well, having defined it as a deterrent  22 message, I thought it was proper, Your Honor, and still think  23 it's proper. And I would ask the Court not to give an  24 instruction.  25 THE COURT: You're entitled to -- let me be clear</p>
<p style="text-align: right;">Page 44</p> <p>1 was not used during the course of the trial.</p> <p>2 MR. SAVAGE: No, it was, Your Honor. It is Exhibit  3 3.</p> <p>4 THE COURT: In what form? You mean, this is the  5 report from the psychiatrist.</p> <p>6 MR. SAVAGE: Yes, sir.</p> <p>7 THE COURT: Of what she had?</p> <p>8 MR. SAVAGE: Yes, sir.</p> <p>9 THE COURT: All right. So we'll have it marked as  10 Jury Exhibit Number 2.</p> <p>11 Massachusetts courts are very clear on several  12 things, particularly with respect to pain and suffering, that  13 it is improper argument to say "what's it worth to you to avoid  14 pain and suffering, is it worth a hundred dollars per second,  15 \$500 per minute" because it has the effect of generating a  16 judgment that is unrelated to the undertaking that the jury  17 has.</p> <p>18 Second, delivering a message is not the role of the  19 jury. They decide cases. And an appeal to the jury to deliver  20 a message is simply improper. And, so, I'll be instructing the  21 jury in my own way of what their responsibilities are. People  22 don't deliver messages in criminal verdicts and they don't  23 deliver messages in civil verdicts. They provide damages.  24 That's their responsibility. And, so, the appeal improperly to  25 some larger obligation or some larger writ is something that I</p>	<p style="text-align: right;">Page 46</p> <p>1 ahead of time on what I'm going to do. You're entitled to your  2 objection. And I understand your objection. You can make the  3 objection at the side bar when you come up at the side bar.  4 But overreaching like that is not an effective way to ensure  5 that the jury stays within its responsibilities.</p> <p>6 So, we'll take a few minutes and then you'll have  7 my instructions.</p> <p>8 RECESSED AT 10:15 A.M.  9 (Reconvened at 10:30 A.M.)</p> <p>10 THE COURT: Ready for the jury?</p> <p>11 Ms. Caulo: Your Honor, one moment before you bring  12 the jury in, if I may. I was wondering if the Court, in light  13 of two references to Mrs. Porter as a whistleblower and sending  14 a message, would the Court be inclined to let the jury know  15 that there have been whistleblower claims that have been filed  16 and dismissed, that under the law --</p> <p>17 THE COURT: I'm not going to deal with it in that  18 fashion. I will try to help the jury understand what it is  19 that they are supposed to do in some of the language that's  20 been used during the course of the trial. I'll not tell them  21 that one of several claims has been dismissed. that has a way  22 of backfiring and suggesting that other claims survive.</p> <p>23 Ms. Caulo: Understood.</p> <p>24 THE COURT: So, are we ready for the jury?  25 Ms. Caulo: Yes. Thank you.</p>

<p style="text-align: right;">Page 47</p> <p>1 (Jury in at 10:35 A.M.)</p> <p>2 THE COURT: Ladies and gentlemen, let me ask you</p> <p>3 again. I have asked you repeatedly during the course of the</p> <p>4 trial. Have you been exposed to anything about this case</p> <p>5 outside of the courtroom, either conversations, anything like</p> <p>6 that? And I see no response to that and that provides the</p> <p>7 occasion for me to start my instructions.</p> <p>8</p> <p>9 COURT'S CHARGE TO JURY</p> <p>10 BY THE COURT:</p> <p>11 We're right at the point at which our various roles</p> <p>12 become quite clear. It's the lawyers' responsibility to bring</p> <p>13 to your attention the evidence that they believe is relevant.</p> <p>14 It's my responsibility to rule on questions of evidence,</p> <p>15 including questions of relevance and to instruct you on the</p> <p>16 law. And then it's your responsibility to decide the case.</p> <p>17 You're going to go into that jury room and there's not going to</p> <p>18 be anybody there but you. It's the time at which you have to</p> <p>19 adhere to the rules. And the rules are the rules that I've</p> <p>20 tried to emphasize to you throughout the trial, the idea that</p> <p>21 you decide the case solely on the basis of the evidence that's</p> <p>22 actually admitted here and my instructions on the law. And</p> <p>23 you're going to decide it in light of the questions that were</p> <p>24 put to you.</p> <p>25 There was a suggestion in closing argument that</p>	<p style="text-align: right;">Page 49</p> <p>1 ways helps you to understand what your responsibilities are.</p> <p>2 You know, you are familiar with it, I'm sure. It's Lady</p> <p>3 Justice with a sword in one hand, scales in another, and a</p> <p>4 blindfold on. Now it's pretty easy to see why she has scales</p> <p>5 in her hand. She's there to weigh the evidence. It's pretty</p> <p>6 easy to see why she has a sword in her hand. She is there to</p> <p>7 enforce the law. But why does she have a blindfold on? She</p> <p>8 has a blindfold on, I'd suggest to you, ladies and gentlemen,</p> <p>9 because it is her responsibility to shield herself, to</p> <p>10 discipline herself, to decide only on the basis of those things</p> <p>11 that are relevant and material, not passion, not bias, not</p> <p>12 undue sympathy, not predisposition, but solely on the basis of</p> <p>13 the evidence as it is relevant here.</p> <p>14 Now, one of the problems with this case -- not a</p> <p>15 problem, but a challenge of this case -- is that it starts to</p> <p>16 seep out into other aspects of controversies in society. You</p> <p>17 have been exposed to what appear to be disputes between federal</p> <p>18 law enforcement and the Sheriff's Department. You have been</p> <p>19 exposed to views about what the proper sanctions should be.</p> <p>20 You have been exposed to the push and tug and robust and wide</p> <p>21 open quality of debates during the course of a political</p> <p>22 campaign. I exposed you to that because it has a relevance in</p> <p>23 the way of evaluation. But one thing you should understand --</p> <p>24 and actually the lawyers emphasized it in their closing</p> <p>25 arguments -- is that you're not here to decide whether or</p>
<p style="text-align: right;">Page 48</p> <p>1 you're here to deliver a message. And with all respect, we</p> <p>2 didn't invite you here to deliver any message. Your</p> <p>3 responsibility is to return a verdict, which from the Latin</p> <p>4 means "say the truth." And we're going to give you some</p> <p>5 questions and we want you to give us truthful answers from your</p> <p>6 perspective to those questions. It is a matter of profound</p> <p>7 indifference to you -- and should be -- what the implications</p> <p>8 are. You're here to decide whether or not certain factual</p> <p>9 statements have been proved there that are alleged and, if so,</p> <p>10 whether damages are appropriate. You will do that by</p> <p>11 performing a function that we have for the jury, which is to</p> <p>12 function as the common conscience of the community, deciding</p> <p>13 cases as lay people in light of rules and the law. It is</p> <p>14 important that you do this in a dispassionate way, in an</p> <p>15 objective way, and not in this way of passionate argument,</p> <p>16 however low key it's delivered.</p> <p>17 When I thought about this case and listened to the</p> <p>18 arguments some more, I thought about trying to explain what</p> <p>19 your responsibilities are by reference to an image that we</p> <p>20 sometimes have of justice. The lawyers have had all the fun</p> <p>21 in the case. They've had the opportunity to show you</p> <p>22 demonstrative evidence and walk around. So let me do that.</p> <p>23 You see this. It's a statue of justice, Lady Justice. You</p> <p>24 sometimes see it at the top of a courthouse. You don't see it</p> <p>25 at the top of this courthouse. But it's a statue that in some</p>	<p style="text-align: right;">Page 50</p> <p>1 not the sanction that was imposed on Mrs. Porter was</p> <p>2 disproportionate. You're not a personnel board. You're not</p> <p>3 here to decide whether or not cheap shots were taken during the</p> <p>4 course of debates or in the public press. You're not here to</p> <p>5 decide who is right and who is wrong, if anybody, in some</p> <p>6 dispute between the agents of federal law enforcement and the</p> <p>7 Sheriff's Department. You're here for purposes of making a</p> <p>8 judgment about the relevance of the questions that I'm going to</p> <p>9 be putting to you. And I'm going to get to that in just a</p> <p>10 moment. But I want to emphasize -- let me emphasize that you</p> <p>11 play by the rules. And the rules require that you be</p> <p>12 dispassionate and objective in your evaluation. That means</p> <p>13 applying your common sense, your common experience, to the</p> <p>14 evidence that has been presented in this case.</p> <p>15 And let me step back a little bit from a definition</p> <p>16 of what the evidence is to talk about how lawyers and judges</p> <p>17 sometimes divide evidence in two basic categories. One is what</p> <p>18 we call direct evidence. Somebody observed something and they</p> <p>19 are here to report on it. Somebody is standing on the corner.</p> <p>20 They saw two cars crash into each other and they say "I saw two</p> <p>21 cars crash into each other."</p> <p>22 And then there is something we call circumstantial</p> <p>23 evidence, which is lawyer talk for actually common sense. But</p> <p>24 it's the use of logic and inference. Let me explain it in this</p> <p>25 way which applies to the weather. Let's say that tonight or</p>



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1 tomorrow, you go home and because it's been raining, your front  
 2 lawn is all clear. You go to bed at 10 o'clock and you wake up  
 3 enough to get here by 9 o'clock. And you look out the window  
 4 and it looks clear. And then you look down on your front lawn  
 5 and there is snow on the front lawn. Now the way I just set  
 6 this up, you'll understand you didn't see it snow. You saw  
 7 that it was clear the night before, you saw it was clear when  
 8 you got up, and you also saw snow on the ground. Well, I'd  
 9 suggest to you that you have circumstantial evidence that it  
 10 snowed between the hours of 10:00 and whenever it was that you  
 11 woke up to come to the court. You can draw that conclusion.  
 12 It's logical, the kind of common inference that people make.  
 13 And maybe you can go further. Maybe you can look on the front  
 14 lawn and see foot steps or footprints. And, so, you say,  
 15 "well, somebody wandered around on my front lawn between the  
 16 hours of 10:00 and 7:00." And maybe you can even go farther.  
 17 Maybe you can say "look at the size of those footprints, it  
 18 must have been a man." Or maybe you can't. Maybe in an age in  
 19 which teenage girls like to go to the prom in Doc Martins, you  
 20 want to reserve your judgment or have a more nuanced judgment  
 21 about that. Now, can you say it must have been a man with  
 22 glasses on? I'd suggest to you you can't. But what you can do  
 23 is take bits and pieces of direct evidence and put it together  
 24 and draw circumstantial conclusions about it because your role  
 25 as the final finders of fact is to decide how much or how

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1 little significance you attach to the various pieces of  
 2 evidence that have come to your attention during the course of  
 3 trial.  
 4 This is a case in which you've had people testify  
 5 about what was said at meetings. And you'll have to decide  
 6 whether you believe what any one of those people said. This is  
 7 a case in which you've seen various events take place. And you  
 8 can say, "well, those are a little bit like the footprints in  
 9 the snow. They tell me what was going on outside of the  
 10 presence of other people." What I mean to emphasize by this is  
 11 that you have very substantial powers to be used the way you  
 12 use powers generally of perception, observation, and conclusion  
 13 to draw the best possible judgment you can in this case.  
 14 Now you should understand that this is a civil  
 15 case. And in a civil case, we allocate burdens. That is, a  
 16 party has to prove something to you. They have to prove it to  
 17 you by what we call a preponderance of the evidence. And what  
 18 that really means is is the proposition that the party is  
 19 contending for more likely true than not true? You've probably  
 20 heard about the standard of beyond a reasonable doubt. That's  
 21 the standard for a criminal case. That's not the standard  
 22 here. The standard here is more likely true than not true. It  
 23 becomes critically important if you say it's 50-50. And if  
 24 it's 50-50, then the party who bears that burden has not  
 25 substantially satisfied you. But it's a way of telling you how

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1 it is that you go about disciplining yourself in the same way  
 2 that Themis, which is the Greek term for Lady Justice,  
 3 disciplines herself in evaluation.  
 4 Now, what is the evidence? Well, the evidence is  
 5 witnesses, human beings who come in here and testify as to  
 6 their recollection, as to their perception. I have to tell you  
 7 that when I charge juries, I'm sometimes embarrassed when I get  
 8 to this point, because the general guidance for Judges is to  
 9 explain to the jury how they evaluate witnesses. And, frankly,  
 10 I don't have to tell you a thing. You do it unconsciously  
 11 every day in your life. That's why we have you as jurors.  
 12 Every day in your life somebody is coming to you and they're  
 13 trying to sell you something, they're trying to persuade you of  
 14 something, and you size them up. You make a determination. Do  
 15 they know what they're talking about? Do they remember events  
 16 in the past? Do they have a bias? Do they have some sort of  
 17 prejudice? Do they lean toward one side or the other? Are  
 18 they consistent? All of those things that you do unconsciously  
 19 are what we're asking you to do consciously here. And, so, let  
 20 me just for a moment discuss this question of how you go about  
 21 evaluating witnesses. I talked about bias. That is somebody  
 22 who is aligned one way or other with one side or the other.  
 23 There is nothing improper about that. All of us understand in  
 24 our daily lives that people lean toward one side or the other.  
 25 But what it means is that you keep on point in evaluating it.

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1 You ask whether or not they are affiliated with one party or  
 2 the other. The argument was made by the plaintiff that persons  
 3 who are employed in the Sheriff's Department might lean toward  
 4 Sheriff Cabral. You might also say that family members might  
 5 lean toward the plaintiff. Well, what that means is that you  
 6 cautiously evaluate their testimony. It doesn't mean you  
 7 disregard it. It simply means that you're going to be more  
 8 conscious in dealing with it.  
 9 There's a question of inconsistencies, what we call  
 10 inconsistencies. Now, inconsistencies are the things, the  
 11 stuff of life. None of us can go home after a day with the  
 12 family and have a discussion about what all of us saw  
 13 presumably at the same time and not realize that some people  
 14 see things differently and recall things differently. They  
 15 have an ability to recall differently and an ability to express  
 16 themselves differently. So, inconsistencies in some ways are  
 17 not unusual. But what you're going to be on guard for are  
 18 inconsistencies that you think are material. Did somebody say  
 19 something at one point and then say something different at  
 20 another point? If you're faced with that, you might say "what  
 21 do I rely on? This person has come down firmly on both sides  
 22 of the fence." Is the person's testimony consistent with other  
 23 testimony, other evidence in the case, or is it widely  
 24 inconsistent or is it mildly inconsistent? You're going to be  
 25 evaluating those things to make your judgment. You will be

<p style="text-align: right;">Page 55</p> <p>1 especially on point when a witness says that they testified 2 falsely on an occasion. That's the kind of testimony that 3 you're going to have to receive with great care and evaluate it 4 with great caution. I'm not suggesting in any way that you 5 disregard any of their testimony. I am suggesting that you be 6 especially disciplined in the way in which you treat it. 7 You have had documents presented to you in the form 8 of exhibits and you have been on the maiden voyage in this 9 courtroom of this kind of equipment owned by the government or 10 owned by the courts. And you'll understand at this time the 11 documents and exhibits are really only as good the people who 12 created them and that you have got to pierce back into your 13 recollection of what were the circumstances in which particular 14 documents were created to decide whether or not the drafter of 15 those documents is reliable, whether or not it's helpful to 16 you. You have seen a series of documents having to do with 17 observations that people have made and you make an evaluation 18 of that as well. I mean only to suggest that just because it's 19 written down doesn't mean it's true. It may and it may not be. 20 And whether a document is is entirely up to you. Because 21 you're going to apply to those documents the same kind of 22 careful evaluation that you apply to evaluation of testimony by 23 witnesses and listening to the arguments of counsel. 24 Now, there are some things that aren't evidence: 25 The arguments of counsel. What they are permitted to do in</p>	<p style="text-align: right;">Page 57</p> <p>1 parties agreed, for example, that an FBI agent, if she came in 2 here, would testify in a particular way. And you're entitled 3 to accept that stipulation. The parties don't want to dispute 4 it. And as I'll say at a later point, there are a myriad of a 5 number of issues that could have been disputed in a case like 6 this, but we've tried to sweat the case down to essentials. 7 And, so, the parties don't dispute certain things, don't think 8 that it's worth fighting about, and consequently you're in a 9 position to accept their stipulation, their view about it, 10 their agreement about it. 11 There is another issue. And I'll tell you a little 12 bit about the back stage of this case. An awful lot goes on in 13 a case before it gets to your attention, particularly a case 14 like this in which there are plenty of opportunities for the 15 jury to get distracted over some matters offering red herring 16 hunts. And, so, you can imagine, as I think you've probably 17 inferred by now, that I had long discussions with counsel about 18 various issues that should be brought to your attention, that 19 need to be brought to your attention, and others that don't. 20 And you're, of course, only concerned with what we brought in 21 here. It would be immensely unfair to the parties if you were 22 making your decision on the basis of something that they didn't 23 have an opportunity to confront right here in front of you. 24 But one of the things that happened in trying to talk about how 25 we could make this case come to you as expeditiously as</p>
<p style="text-align: right;">Page 56</p> <p>1 argument is to draw your attention to certain pieces of 2 evidence -- if, in fact, you find that evidence was there -- in 3 an attempt to persuade you. But just because some lawyer says 4 it doesn't mean that it's a piece of evidence. You have to 5 evaluate that evidence in a larger context. 6 Questions to witnesses in which I sustained 7 objections, you have seen that happen on a number of 8 occasions. I told you at one point in the trial and I'll tell 9 you again. You don't draw any conclusions from the rulings 10 that I make except that you've got to be guided by them. 11 Lawyers have a responsibility to press their case, to look for 12 a resolution from the Court, and I give a resolution. But the 13 questions in which I've sustained an objection, you just put 14 out of your mind. It's not part of the case for you. I have 15 always thought that jurors are a little bit like the folks who 16 have -- I won't call them cheap seats in the theater, but those 17 seats that are over at the corner where you can sometimes see 18 what's going on back stage. Now, if you're a purist, I 19 suppose, and all of you want to sit in the front row center, 20 then you get distracted by that. But if you're not and if 21 you're a person who understands that there is activity that you 22 should focus on and disregard the stuff that occurs back stage, 23 well, you'll understand what your role is in dealing with this 24 question of my rulings on the objections. 25 There are certain issues that were stipulated. The</p>	<p style="text-align: right;">Page 58</p> <p>1 possible is what I'll call order of proof issues. Ordinarily, 2 the plaintiff goes first, the defendant goes second. That's 3 what happened here. And ordinarily what happens in cases is 4 that the plaintiff puts on her witnesses here and I would limit 5 the cross-examination of such witnesses to only what they 6 testified on direct examination. But here, because it would 7 mean having the same witnesses come back again, I said, well, 8 what we'll do is the plaintiff can put on witnesses that she 9 wants to put on and I will permit the defendant to cross- 10 examine them on all of the issues that she thinks are 11 important. And consequently, there is not that limitation 12 which you sometimes see. Now, why do I tell you that. It 13 sounds like inside baseball. It is. I tell you that because I 14 want you to understand that the case doesn't turn on who called 15 the most witnesses. It turns on the nature of what those 16 witnesses said. And, so, you're not going to draw any 17 conclusion from the fact that the plaintiff called most of the 18 witnesses, because that's the way we set it up in the trial. 19 You are focused directly on the principal issues in this case, 20 which are who do you believe and when did the particular events 21 take place and for what reason? 22 Now, let me turn to the questions that we're 23 presenting to you. I'm going to ask Ms. Rynne to pass to you 24 the verdict slip that we've been talking about. We're going to 25 walk through this. And at the risk of keeping you from turning</p>

## PORTER V CABRAL - DAY 7&gt;

<p style="text-align: right;">Page 59</p> <p>1 to see how it turns out at the end, let's start with page one  2 and we'll work our way through. I'm going to instruct you on  3 all of the things that you might possibly confront. But as you  4 can see at each one of the pages, I say if you've answered a  5 particular answer to a question, you either go on or you return  6 your verdict. And, so, what this means is that you may in  7 course of the trial make a deliberation -- excuse me. I  8 apologize for a cold that's getting the better of me. But you  9 may, during the course of deliberations, say you've reached  10 this and you're now going to return the verdict. So I don't  11 mean to suggest that you have to go all the way through on it.  12 I just want to tell you what it is that you're going to be  13 confronting as you go through. What you're not going to be  14 confronting is some legal theories. I'm not going to tell you  15 about the elements of various kinds of causes of action.  16 That's not where we are in this case. Where we are in this  17 case is trying to get answers to two particular questions, fact  18 questions. And then, if it comes to that, you turn to the  19 question of damages.  20 There isn't a dispute between the parties about  21 whether or not there is a 1st Amendment right to communicate  22 with the FBI about matters of interest to the FBI. Neither  23 party disputes that. There is. Now, having recognized that,  24 we come to the question of whether or not there was a form of  25 what we'll call retaliation against Mrs. Porter for her</p>	<p style="text-align: right;">Page 61</p> <p>1 substantial and motivating factor in the defendant's decision.  2 The defendant could take her action for many different reasons,  3 some of which are expressed by her and some that weren't  4 expressed by her, but that you may find during the course of  5 evaluating the evidence. And then you must determine whether  6 or not one of those reasons was that Mrs. Porter exercised her  7 constitutional right to communicate with the FBI. And if that  8 communication with the FBI was one of those reasons, then you  9 must determine whether it played a substantial part in the  10 actual decision to bar her. And if it did play a substantial  11 part, then you must find that plaintiff's protected speech was  12 a substantial or a motivating factor in the defendant's  13 decision.  14 Now, you see that I started this question by saying  15 "Has the plaintiff established by a preponderance of the  16 evidence." This is one in which the plaintiff bears the burden  17 of satisfying you that it's more likely true than not true that  18 her protected speech was a substantial or motivating factor in  19 the decision to bar the plaintiff from the Suffolk County House  20 of Correction.  21 I told you at the outset that you're not here to be  22 a super personnel board, to decide whether or not this was  23 disproportionate sanction, that it was too harsh, that in the  24 exercise of human relations, people shouldn't do that sort of  25 thing. You're not here for that function. But you may</p>
<p style="text-align: right;">Page 60</p> <p>1 exercise of what everybody concedes is a constitutional right.  2 And in making that kind of evaluation, we ask you a particular  3 question that comes out of the case law in this area. What  4 we're asking you is whether or not Mrs. Porter's protected  5 speech -- that is, communications with the FBI -- was a  6 substantial or a motivating factor in the defendant's decision  7 to take action against her. What we're asking you is whether  8 or not it played a substantial part in the actual decision to  9 bar Mrs. Porter. Now, you can understand that things happen in  10 life for a variety of reasons that can be articulated and  11 sometimes can't be articulated. They can happen for one reason  12 or they can happen for a mix of reasons. So you can understand  13 that the defendant here could have taken her action for no  14 reason whatsoever, no articulable reason. She could. She says  15 that she did. She says that she had very particularized  16 reasons having to do with medical records. But if she had no  17 reason and or if she had these other reasons and you find that  18 to be the case, then you're going to be saying that the  19 plaintiff's speech had played no substantial part and was no  20 motivating factor in the defendant's decision. The defendant  21 could have taken her action as the result of a sole reason or a  22 sole reason broken up into three parts as you saw in the  23 interrogatory. And if that reason or collection of reasons was  24 other than the exercise of a constitutional right, then you  25 can't say that the plaintiff's protected speech was a</p>	<p style="text-align: right;">Page 62</p> <p>1 consider whether or not the sanction was proportionate,  2 consistent in deciding whether or not what have been offered as  3 the reasons for barring are the true reasons and the only  4 reasons or a pretext. So, you're not an H.R. board, but you  5 are going to consider this as part of the circumstantial mix.  6 Similarly, you're not going to get yourself involved in what  7 kind of disputes were going on between law enforcement and the  8 FBI as I told you. But you're going to consider the context in  9 making a judgment about whether or not the exercise of  10 constitutional rights in this fashion was a substantial and  11 motivating factor in the decision to bar by evaluating the  12 context the way you evaluate any context. People are involved  13 in conflicts all the time. And what you've got to do is tease  14 it out a bit to decide whether or not that had an effect in  15 this case in the fashion that I have talked about.  16 You may think that political campaigns lead to  17 rough stuff and people make statements to influence elections  18 on both sides. And I have told you you're not here to evaluate  19 the nature of the election campaign and the attendant publicity  20 related to it. But it may provide you with some insight into  21 the intentions of the defendant here and, to a lesser degree,  22 the evaluation of the credibility of the plaintiff. It's part  23 of the mix, but to be used only for those purposes of deciding  24 how it is you determine whether or not the exercise of those  25 constitutional rights was a substantial and motivating factor.</p>

<p style="text-align: right;">Page 63</p> <p>1 If you find that, as I've described this, her exercise of 2 constitutional rights was a substantial or motivating factor, 3 then you answer this question "yes" and you move on to question 4 two. If you find it wasn't, then you answer the question "no" 5 and you return the verdict. 6 So, let's assume that you've answered "yes," not 7 because I'm telling you to answer that question, but because we 8 have got to go through all the potential permutations. 9 Question two asks the question from a somewhat -- 10 raises the issue, I should say, from a somewhat different 11 perspective -- that is, from a perspective of the defendant 12 because the defendant here bears the burden on this question. 13 We're assuming that you've gotten to the point of saying, well, 14 Mrs. Porter's exercise of her constitutional rights was a 15 substantial and motivating factor. But you might say there are 16 a lot of factors involved. And what you've got to do here is 17 pull out the question of communication with the FBI and say, 18 "if we didn't have that communication with the FBI, would they 19 still have barred her?" That's the issue. If Mrs. Porter had 20 done what she had done and not communicated to the FBI, that 21 that was not part of the mix, would Ms. Cabral have taken the 22 step that she took? She has the burden of convincing that she 23 would have by a fair preponderance of the evidence. 24 There was a Professor of the Columbia Law School -- 25 his name was Thomas Reid Powell -- who once said that "the</p>	<p style="text-align: right;">Page 65</p> <p>1 There are two basic elements of damages here. The 2 first is what we call economic damages. And the presentation 3 with respect to economic damages was that after Mrs. Porter was 4 barred and up to today, she has received reduced compensation 5 at her further place of employment and that she may anticipate 6 that for the next 10 years because it's anticipated, 7 Mrs. Porter tells us, that she would have worked for another 10 8 years or so. Now you understand the whole series of 9 contingencies involved with that. Would the contract with the 10 Suffolk County House of Correction by Correctional Medical 11 Services have continued? Would Mrs. Porter have continued to 12 work? Would the demands of family or other demands interfere 13 in some fashion? You will have to ask yourself those questions 14 in making that determination. It is illusory to assume that 15 you see a figure on the board and that's the figure. You have 16 to look more carefully with greater discrimination in 17 evaluating that. What will happen in the future? Will someone 18 decide that, gee, I don't feel like driving that far any longer 19 or there are other things that capture my attention? But those 20 contingencies and your evaluation have to be based on the 21 evidence itself. You're not speculating. You're not just kind 22 of out there free floating. You have heard from Mrs. Porter. 23 You've got some sense of her work ethic. And you'll make an 24 evaluation on the basis of that and other evidence in this case 25 about her ability to get continued employment, at what level</p>
<p style="text-align: right;">Page 64</p> <p>1 lawyer is someone who can think about several things that are 2 inextricably intertwined and talk about one of them without 3 talking about the other." And that, in some ways, is what 4 we're asking you to do here. At this point you've reached the 5 conclusion that the substantial and motivating factor here was 6 exercise of her constitutional rights. Now you've got to start 7 separating out what you find to be the reasons and evaluate it 8 and weigh whether or not the sanction that was imposed upon 9 Mrs. Porter, that of barring, would have been taken. You will 10 consider all of the circumstances, what people said, what they 11 didn't say, what they said they didn't say, all of those 12 things. You'll consider proportionality and conflict to try to 13 tease out the answer to this question if you come to it. If 14 you answer this question "yes," then you'll return a verdict at 15 that point without going any farther. If you answer this 16 question "no," then you move on to the next set of questions. 17 And the next set of questions are the questions of 18 damages. Part of the question of damages that makes it so 19 difficult for Judges to instruct on and for jurors sometimes to 20 come to grips with is that it depends on a variety of 21 contingencies. And judgments like that don't generally -- and 22 in this case entirely -- lend themselves to double-entry 23 bookkeeping, it's not as fixed as that. It does require the 24 exercise of your common sense, your judgment about how things 25 actually work.</p>	<p style="text-align: right;">Page 66</p> <p>1 and for how long that are the economic damages that are at 2 issue here. 3 There is a second element of damages that are 4 referred to as emotional distress or sometimes called pain and 5 suffering. And you saw me restrict the argument with respect 6 to that because of this. This is an area in which the courts 7 have generally been concerned that passion and sympathy can be 8 the source of distraction to the juries in making their 9 evaluation. But let's step back a bit. The law recognizes 10 that if someone has been harmed, they may have pain in the 11 sense of someone has their arm twisted and it causes pain or if 12 they break their leg, but they could also have pain in terms of 13 the interference with how their life would have proceeded 14 absent this wrongful act. I think all of us, to greater or 15 lesser degrees, are tied up in our work, get value from it, 16 satisfaction from it, get a sense of who we are and what we 17 aspire to be. That's real. There's no particular guideline, 18 specific guideline to tell you how you evaluate that, but you 19 may consider it. You may consider whether or not there has 20 been an interference with the enjoyment of life to its full 21 degree as a result of actions. That's what pain and suffering 22 means in this context. 23 Now, I have told you that passion and undue 24 sympathy shouldn't influence you and it shouldn't. And I'll 25 emphasize again this is not about delivering a message. This</p>



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1 is about finding just compensation. Because the overarching  
 2 issue for purposes of damages is to put Mrs. Porter back in the  
 3 position that she would have been but for -- what you will have  
 4 found if you get to this point -- the wrongful act of Sheriff  
 5 Cabral. As hard as it is, this is the guts of what we want  
 6 from juries, people with diverse backgrounds, diverse  
 7 experiences coming together and trying to work out a way of  
 8 expressing in dollars, because that's the only way we have to  
 9 express it, what damage, if any, was caused.

10 Now, you'll see that I said "Indicate in a dollar  
 11 figure or 'NONE.'" And you're free to make your calculation  
 12 based upon your view of what just compensation would be here --  
 13 that is, what is necessary to put Mrs. Porter back in the  
 14 position that she would have been but for what, as I've said,  
 15 you may have found at this point to be the wrongful act. And  
 16 that could be a dollar amount. One was suggested to you in a  
 17 writing -- at least part of it in a writing by Mr. Savage --  
 18 or it could be one dollar: One dollar is what we call nominal  
 19 damages. That is, in cases, particularly civil rights cases in  
 20 which someone has been deprived of their civil rights and the  
 21 jury is satisfied that they are, but nevertheless doesn't  
 22 believe that there is any real damage as a result, they put  
 23 down one dollar. So, if you consider that this was a violation  
 24 of civil rights, but there was no damage, put a dollar down.  
 25 But you can also put any dollar that is fairly based in the

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1 evidence here in your exercise of common sense as well or you  
 2 can say "none." And if you say that there were no damages,  
 3 then you're going to return your verdict to us and not move on  
 4 to the next question. But if you put a dollar figure in there,  
 5 some actual dollar figure or some nominal dollar figure, then  
 6 you go on to the next issue. And that's this issue of punitive  
 7 damages.

8 Punitive damages is a form of damages that is  
 9 recognized by the law essentially to provide a deterrence, both  
 10 as to a particular defendant and to others who are similarly  
 11 situated to the defendant. You'll recall the call to deliver a  
 12 message. That's not what we're talking about here. What  
 13 you're here to do is make a judgment about the appropriate, if  
 14 any, sanction to be imposed above compensatory damages. That  
 15 is, this is money that would be awarded to Mrs. Porter standing  
 16 for a punishment, something like a fine. Now, one way to  
 17 evaluate it is the way that there is evaluation of punishment  
 18 in the criminal law, which is to say the punishment should be  
 19 no more than is necessary adequately to deter both the  
 20 defendant and others similarly situated and to reflect a  
 21 judgment about the seriousness of the illegal action. This  
 22 much is clear: That when a party defendant consciously  
 23 undertakes with a callous or reckless disregard violation of a  
 24 plaintiff's constitutional rights, you may award punitive  
 25 damages. We say an award of punitive damages is discretionary

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1 in the sense that we're leaving it to your good judgment, but  
 2 guided by the principle principally, I would suggest to you, of  
 3 deterrence. Punitive damages are ordinarily awarded simply  
 4 to -- but specifically to punish a defendant for outrageous  
 5 conduct, but also to deter her and others like her from  
 6 performing similar actions in the future. In deciding whether  
 7 or not to award punitive damages, you should consider whether  
 8 or not, if you reach this point, Sheriff Cabral may be  
 9 adequately punished by the award of compensatory damages alone  
 10 or whether or not her conduct was so extreme or outrageous that  
 11 actual damages are inadequate to punish the wrongful conduct.  
 12 You'll consider whether or not the compensatory damages, the  
 13 actual damages, the page three damages are, standing alone,  
 14 likely to deter or prevent Sheriff Cabral or others in the same  
 15 circumstance from committing unlawful acts or wrongful acts.  
 16 If you decide to award punitive damages, you will be  
 17 considering those factors in telling us what the proper award  
 18 would be. You should consider in that connection whether or  
 19 not and to what degree Sheriff Cabral should be punished here  
 20 by that award and the degree to which any award will deter and  
 21 the proportionality of the award of punitive damages to any  
 22 compensatory damages that are imposed. You may consider  
 23 whether or not there's a wild departure between what the  
 24 compensatory damages are and what the punitive damages are in  
 25 making a judgment about what the proportion is. But this is

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1 another matter left to your judgment as the common conscience  
 2 of the community. You must be disciplined. This is not an  
 3 opportunity to just go off on your own. You have a limited  
 4 role. You have to answer the questions here. And the  
 5 questions here have to be answered in accordance with the rules  
 6 that I have just given you.

7 Now, before I go on to the final stage of the  
 8 instructions, I'll see counsel at the side bar.  
 9 (Beginning of side bar conference)

10 THE COURT: Mr. Savage, anything further?  
 11 MR. SAVAGE: No. I preserve my earlier objection,  
 12 Your Honor.

13 THE COURT: The earlier objection to what?  
 14 MR. SAVAGE: The Court's limiting the discretion on  
 15 what the jury may consider as a deterrent.

16 THE COURT: If the objection is my treatment of the  
 17 question of delivering a message, that is preserved.

18 MR. SAVAGE: Thank you.

19 MR. DAVIN: Just a discussion, Your Honor, of  
 20 proximate cause saying -- there was a suggestion in the  
 21 testimony of everything else is going to be damages proximately  
 22 caused by the actions.

23 THE COURT: All right.

24 MR. DAVIN: And I think it was clear in your  
 25 instruction, but I wanted to make sure they understand that,

<p style="text-align: right;">Page 71</p> <p>1 in absence of protected activity, I think she is within her 2 rights if the misconduct of the plaintiff came to her attention 3 through the protected activity reported to the FBI. 4 THE COURT: I don't think so. It would be 5 confusing for me to argue that particular issue. I'm not going 6 to add that. 7 MR. DAVIN: That's all we have. 8 (End of side bar conference) 9 BY THE COURT: 10 Let me add one further element of the legal instructions 11 to you that I think is implicit, but I do want to emphasize it. 12 When you move from the question of liability, if you do, to 13 damages, you understand that the damages for which a defendant 14 would be responsible are only those that are what we call 15 proximately caused, actually caused. That is to say, to put it 16 in the most extreme form, Mrs. Porter is barred and she walks 17 out of the Suffolk County House of Correction and she is run 18 over by a car. Now, the defendant wouldn't be responsible for 19 the car running over Mrs. Porter. But the defendant is 20 responsible for anything that flows directly as a consequence, 21 as a result of her decision to bar. Interference with job 22 prospects and opportunities, effects on the emotional life of 23 the defendant -- of the plaintiff, excuse me -- on her sense of 24 herself. But there has to be a connection between the act that 25 you find wrongful, if you find it to be wrongful, and the</p>	<p style="text-align: right;">Page 73</p> <p>1 and a willingness to listen. Now I told you I can't tell you 2 what to do in the jury room. And I can't. But I can make 3 suggestions. And my first suggestion is this: There is always 4 a tendency, I think, to say "let's take a straw vote and see 5 where we are, let's get going." And I'd urge you not to do 6 that. The danger of taking a straw vote early on is people get 7 fixed in positions. And, so, they end up defending their 8 position rather than listening to the conversation. I will 9 make the suggestion. My suggestion is this: That you sit down 10 at the table and you just go around the table and listen to 11 what each individual person says "here is what I thought was 12 significant in the evidence." Part of this is a collective 13 effort at collective recollection for purposes of collective 14 judgment. And people will say things during the course of the 15 process that will cause you to think "oh, yes, now I remember 16 that and that causes me to think about this" and you'll add to 17 the discussion. So I would suggest that at least at the early 18 stages you do that. 19 It is necessary for there to be a foreperson of the 20 jury. And Mrs. Van Hone, you made the mistake of sitting in 21 the first seat here. And, so, after a nationwide search, you 22 have been designated as the foreperson. There is no extra 23 money involved in this. But, what you do have a responsibility 24 to do is just make sure that there is an orderly discussion, 25 that people aren't talking over each other and that sort of</p>
<p style="text-align: right;">Page 72</p> <p>1 damages that you find are appropriate there. They can't be 2 unrelated or it can't just be everything that happened after 3 the barring. 4 Now, let me turn to the question of how you conduct 5 your deliberations. The whole purpose of jury deliberations, I 6 think, is for a rational discussion of the evidence for 7 purposes of reaching a unanimous verdict. And in the Federal 8 Court, your verdict must be unanimous on all of the questions 9 that you choose to and are required to answer. But that means 10 that -- and should mean that every juror has to decide this 11 case for herself or himself, but you have to give proper 12 consideration to the views of others. And you've got to be 13 prepared to reconsider your own views if you're persuaded by a 14 rational discussion and certainly not solely for the purpose of 15 reaching a unanimous verdict. That is, you're part of a group, 16 but you stand alone. This has to reflect your own judgment in 17 this case. But being part of a group means listening to what 18 the other person has to say. It may happen to you, as 19 frequently happens to jurors, that you get in there and you 20 start discussing and that person who was sitting next to you 21 who seemed so apparently reasonable during the course of the 22 trial before you started discussing the case starts saying 23 things that you find quite striking or surprising or even 24 unreasonable. That's nothing new. That is part of the process 25 to getting to judgment here. And what it requires is civility</p>	<p style="text-align: right;">Page 74</p> <p>1 thing, so that everybody gets a chance to be heard and that 2 sort of thing. One thing that I'll suggest to you is that if 3 people take a break or they use the facilities, they want to 4 stop for a while, one person wants to leave the room for 5 whatever reason, stop the discussion. The discussion should 6 only take place when everybody is present here. Now, during 7 the course of the deliberations, if you have questions -- my 8 hope is that I have been clear enough about what your 9 responsibilities are and you shouldn't have questions just to 10 avoid your responsibilities. But if you have questions that 11 touch on this case, you'll put them in writing and I will share 12 them with counsel to give you some sort of response. It's 13 generally not an immediate turnaround because we have to 14 discuss the issues here. But if you have something that 15 touches on this case, I want you to put it in writing and 16 deliver it either to Ms. Rynne if she's nearby or to the court 17 officer if he's outside the room. One thing you shouldn't tell 18 us is where you stand. At some point, you will take a vote and 19 you may find yourselves standing eight to four or something 20 like that. Don't tell us. We are not entitled to know. That 21 is part of the ongoing process of reaching a unanimous verdict 22 that we can't even have a peek at. So, don't tell us where you 23 stand at any particular point. But if you have a particular 24 question about the case, put it in writing. Creature comfort 25 kinds of questions like "when do we eat," ordinarily Ms. Rynne</p>

<p style="text-align: right;">Page 75</p> <p>1 will be able to tell you that or the court officer. But I have  2 the responsibility today because Ms. Rynne told me. And it's  3 going to be at noon, we'll bring in food for you. I told you  4 yesterday that we'll be ceasing deliberations today at 1:30  5 because one of your number had explained earlier he has a  6 responsibility outside. And that really is meant to emphasize  7 this final point: In criminal cases, one of the unhappiest  8 aspects of my responsibility, among many of the unhappy aspects  9 of criminal cases, is that when we pick the jury, we pick the  10 regular jury and then we have alternates. And when the jury  11 goes out to deliberate, I have to limit it to 12 people and the  12 alternates have to be discharged. I hate to do it. I hate to  13 do it because we have imposed on the time of the alternates to  14 sit on the case and they don't even get the opportunity to  15 resolve it. That doesn't happen in civil cases. I will do  16 everything possible to make sure that everybody gets the  17 opportunity to deliberate. And as I told you, if one of you  18 can't be deliberating, then you should stop it. And, so,  19 that's what we're going to do today. So, if you haven't  20 returned a verdict by 1:30, we'll just bring you in, send you  21 home, and have you come back tomorrow to continue your  22 deliberations. The touchstone is this: That you treat each  23 other with civility, you evaluate only the evidence that's  24 important to you and has been properly presented here in court  25 and that you do it in a dispassionate, unbiased fashion without</p>	<p style="text-align: right;">Page 77</p> <p>1  2  3 CERTIFICATION  4 I certify that the foregoing is a correct  5 transcript of the record of proceedings in the above-entitled  6 matter to the best of my skill and ability.  7  8  9  10  11 _____  12 Pamela R. Owens Date  13 Official Court Reporter  14  15  16  17  18  19  20  21  22  23  24  25</p>
<p style="text-align: right;">Page 76</p> <p>1 undue sympathy, but with full empathy that human beings should  2 have for all the people who participated in this case in your  3 evaluation of the evidence. If do you that, we'll be  4 satisfied.  5 If there is nothing more from counsel, then I'll  6 let you return to the jury room and now you get a chance to  7 talk about this case. Good luck.  8 (Jury out at 11:30 A.M.)  9 THE COURT: I take it that the parties are in  10 agreement about the evidence that is going into the jury room  11 and what was submitted and so on. The short of it is you're  12 not leaving this room until you are and you give the exhibits  13 to Ms. Rynne so she can take them into the jury room. And I'd  14 like to do that promptly. I think there is agreement on all of  15 the -- what, in fact, was actually admitted in the case. Okay.  16 Five-minute rule. You have got to be some place we can get you  17 in five minutes because things will happen in your absence if  18 you're not. All right. Thank you very much.  19 RECESSED AT 11:30 A.M.  20  21  22  23  24  25</p>	